No. 88-169

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SAMUEL LORING MORISON,
Petitioner,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONER

CHARLES F.C. RUFF
MARK H. LYNCH *
MARTIN WALD
STEVEN F. REICH
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

ROBERT F. MUSE
STEIN, MITCHELL & MEZINES
1100 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 737-7777

Attorneys for Petitioner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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This case presents the questions of whether Congress intended the espionage statute, 18 U.S.C. § 793(d) and (e), and the theft of government property statute, 18 U.S.C. § 641, to apply to a government employee who discloses or retains documents relating to the national defense for the purpose of leaking them to the press; and, if so, whether these statutes, as construed by the courts below, are unconstitutionally vague or overbroad. The government does not deny that Morison is the first person to be convicted under these statutes for disclosing information to the press and that this case therefore presents questions of first impression. Nor does the government's brief in opposition say one word to dispute the

obvious importance for the press and the public of the questions raised by the government's test prosecution of Morison. This silence is a tacit admission that this case merits this Court's review.

The government's opposition is devoted entirely to an attempt to demonstrate that the plain language of the statutes applies to those who leak national defense information to the press. The government makes this argument as if the statutes involved here were regulatory legislation, for which the plain language rule has the greatest force. But this case involves criminal statutes that affect not only Morison's liberty, but also the press' ability to report to the public important information on the government's activities in the area of national defense. Under these circumstances, it is clearly appropriate for the Court to go beyond the plain language of the statutes and consider their legislative history, subsequent acts of Congress, the views of Executive Branch officials responsible for protecting the national security, and the government's failure for decades to use these statutes as it has used them against Morison. All these factors are relevant to the ultimate questions of whether Congress intended the statutes to apply to Morison's conduct and whether Morison had adequate notice that his conduct was criminally proscribed.

It is also disingenuous for the government to rely on the plain language of subsections 793(d) and (e) when the government urged the courts below to adopt a limiting construction of the term "relating to the national defense" in order to deflect Morison's constitutional attack on the statute. Furthermore, the plain language of section 641 does not resolve the issue of whether Congress intended juries to value government documents on the basis of the information they contain rather than, as

the statutory language suggests, on the basis of their worth as tangible property.[1]

The government chastises petitioner for relying on "snippets of legislative history" (Br. in Opp. at 12) and asserts that the legislative history is in fact consistent with its view that subsections 793(d) and (e) apply to leaks. A petition for certiorari is not the place for a full exposition of the legislative history of the Espionage Act of 1917, and at this stage Morison relies heavily on an exhaustive study of the statute that concluded that "Congress undoubtedly did not understand 793(d) and (e)" to reach "[t]he source who leaks defense information to the press." Edgar and Schmidt, *The Espionage Statutes and Publication of Defense Information*, 73 Colum. L. Rev. 929, 1000 (1973). This study amply demonstrates that the government's view of the legislative history is open to serious challenge.[2]

The government also seeks to avoid the significance of the fact that Congress has enacted other statutes to proscribe disclosure of specific types of national defense information by pointing out that there is nothing unusual about Congress enacting overlapping statutes. Morison's point, which the government has not met, is that Congress enacted these other statutes not to add new penalties to those provided by existing law, but because Congress understood the Espionage Act of 1917 to cover only disclosures to spies and the theft statute to have no application at all to leaks to the press. The enactment of these specific statutes demonstrates that Congress believed that sections 793(d) and (e) and 641 did not au-

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[1] Significantly, the government concedes that Morison's felony convictions under section 641 were based on the value of the information in the photographs and Weekly Wires rather than their tangible value. (Br. in Opp. at 17.)

[2] Ironically, the government relies on "snippets" of the Edgar and Schmidt article to attempt to blur its central conclusion on subsections 793(d) and (e).

thorize prosecution of those who disclose to the press the highly sensitive material covered by the subsequent legislation.

The government also attempts to minimize the widely-held view of national security officials that current law does not criminalize leaks to the press by suggesting that only "some members of the Executive Branch have questioned whether any criminal statute applies to leaks of classified information to the press." (Br. in Opp. at 16 n.11.) This view is not, as the government suggests, the idiosyncratic opinion of a few dissenting officials. Instead it is the long-held institutional position of the CIA, which the Agency conveyed to the Office of Management and Budget even after Morison had been indicted and was awaiting trial. *See* Pet. at 21. Since the CIA and the Department of Justice cannot agree whether sections 793(d) and (e) and 641 apply to leaks, these statutes plainly fail to meet the fundamental constitutional requirement that "a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983).

Finally, the government fails to account for the fact that prior to this case there had been only one indictment and no convictions under the espionage and theft statutes for disclosures to the press. In 1979 the General Counsel of the CIA told Congress that if subsections 793(d) and (e) apply to leaks, "we have had in this country for the last 60 years an absolutely unprecedented crime wave because surely there have been thousands upon thousands of unauthorized disclosures of classified information . . . ." *Espionage Laws and Leaks: Hearings Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence*, 96th Cong., 1st Sess. 22 (1979). In view of the length of time sections

793 and 641 have been on the books—over 70 and 100 years, respectively—and the frequency of leaks, the failure to use the statutes is persuasive evidence that they were not intended or understood to apply to leaks. It is simply not adequate to respond, as did the court of appeals (Pet. App. 18a), that leakers are difficult to catch and that prosecutions may lead to disclosure of more classified data. Those concerns are even more acute in cases of real espionage, and there has been no lack of prosecutions of spies during the many years when there were no prosecutions of leakers.

The government's opposition also contains a serious misstatement. The government asserts that the nondisclosure agreement Morison signed acknowledged that unauthorized disclosure of classified information "may violate, inter alia, 18 U.S.C. § 793." (Br. in Opp. at 4.) This is not correct. In paragraph 3 of the agreement Morison acknowledged that "I am obligated by law and regulation not to disclose any classified information in an unauthorized fashion." (Court of Appeals App. 1178). This paragraph does not specify what laws or regulations impose this obligation, and the paragraph makes no mention whatsoever of criminal penalties. However, in paragraph 6 of the agreement Morison acknowledged that "I have been advised that any disclosure of Sensitive Compartmented Information by me may constitute violations of United States criminal laws, including [inter alia 18 U.S.C. § 793]."

According to this agreement, criminal liability attaches only to the disclosure of Sensitive Compartmented Information (SCI), which is a special category of classified information. The photographs and Weekly Wires, although classified, were not designated as SCI. Morison's secrecy agreement therefore supports his position that he was not on adequate notice that disclosure of non-SCI classified information was a criminal offense. Furthermore, the distinction drawn in the agreement between non-SCI classified information and SCI information

for purposes of criminal liability further underscores the confusion within the government over the reach of subsections 793(d) and (e). Moreover, the omission from the secrecy agreement of any mention of section 641 shows that the government officials who drafted the agreement did not understand that statute to apply to disclosure of classified documents.

In summary, whether the espionage and theft statutes apply to leaks to the press is a complex question of undoubted importance that cannot be answered by wooden application of the plain language rule. Because this case involves harsh penal statutes whose interpretation will affect the amount of information about the operations of government that is available to the public, it is appropriate for the Court to consider all the factors outlined above to determine whether Congress intended these statutes to apply to disclosures to the press and whether Morison had adequate notice that his conduct was criminally proscribed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES F.C. RUFF
MARK H. LYNCH *
MARTIN WALD
STEVEN F. REICH
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

ROBERT F. MUSE
STEIN, MITCHELL & MEZINES
1100 Connecticut Ave., N.W.
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